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Fifth Amendment--Impeachment: Harris v. New York, 401 U.S. 222 (1971)

of exposed flanks which should never have been pushed so far. Whether the process of rectification has now been substantially completed and whatever high ground remains will henceforth be vigorously defended, or whether each new test will be the occasion for further erosion of the protection of individual rights, will depend partly on the evolving philosophies of the present members of the Court, and partly upon the character of the impending successors.

FIFTH AMENDMENT—IMPEACHMENT

Harris v. New York, 401 U.S. 222 (1971)

On January 7, 1966, Viven Harris was arrested for selling narcotics to an undercover agent and taken to an assistant district attorney's office. He was told of his privilege to remain silent and that what he said might be used against him. He was not told of his right to counsel, or that one would be provided him if he were indigent. Questioning began and Harris indicated he would like to talk to a lawyer. The assistant district attorney then stopped the questioning and notified him of his right to an attorney. Harris changed his mind and said he would talk to an attorney the next day. He was told of the charges against him, and his interrogation resumed.[1] Harris then admitted that he had sold narcotics to an undercover agent on January 4 and 6.[2]

At trial, Harris denied on direct examination that he sold any drugs on either date, but testified that on January 6 he sold two envelopes of baking powder to the agent as heroin. His earlier admission in the interrogation was introduced to impeach this testimony. The trial court determined that the full *Miranda* warnings had not been given, but ruled that the statement could be used for impeachment purposes.[3] The pertinent portions of the statement were read to the jury, and the court instructed them that it went only to the defendant's credibility, not to proof of guilt. Harris was acquitted by the jury of the January 4 narcotics sale, but was convicted for selling heroin on January 6.[4]

The Appellate Division affirmed the conviction 3-2. The prosecution conceded on appeal that the warnings given did not satisfy *Miranda v. Arizona*[5] and the deciding justice found that the statement did not meet the standards of the *People v. Kulis* rule of impeachment,[6] but the majority nevertheless held that the use of the statement for impeachment was harmless error.[7] The dissenting justices felt there was some doubt shown by the jury about the agent's veracity, since they did not find Harris guilty of the January 4 count, despite the unmistakably incriminatory statement. They believed that there was " 'a reasonable possibility' " that the statement " 'might have contributed to the conviction,' " so it could not be harmless error.[8] They concluded,

> [I]t is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's.[9]

The New York Court of Appeals affirmed per curiam.[10]

At issue in the Supreme Court was whether a

[1] People v. Harris, 31 App. Div. 2d 828, 829, 298 N.Y.S.2d 245, 246 (1969).

[2] *Id.* at 829, 298 N.Y.S.2d at 247.

[3] *Id.* Miranda v. Arizona requires that four warnings be given the suspect before questioning begins: the right to remain silent; what is said may be used in court against him; the right to counsel; the right to free counsel if indigent. *See* 384 U.S. 436, 467–73 (1966).

[4] 31 App. Div.2d at 829, 298 N.Y.S.2d at 247.

[5] The majority noted that the *Miranda* violation was not clearcut, and that had the trial court held a hearing on the matter, it might well have come out the other way. *Id.* at 830, 298 N.Y.S.2d at 248.

[6] 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1967). The two concurring justices found that *Kulis* was satisfied. 31 App. Div. 2d at 830–31, 298 N.Y.S.2d at 249. *See* Harris v. New York, 401 U.S. 222, 229 n. 2 (1971) (Brennan, J., dissenting).

[7] 31 App. Div. 2d at 830, 298 N.Y.S.2d at 248. *See* Chapman v. California, 386 U.S. 18 (1967).

[8] 31 App. Div. 2d at 831–32, 298 N.Y.S.2d at 250, quoting Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963).

[9] 31 App. Div. 2d at 831–32, 298 N.Y.S.2d at 250.

[10] 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969). Chief Judge Fuld, who had joined Judge Keating's strong dissent in People v. Kulis, 18 N.Y.2d 318, 323, 221 N.E.2d 541, 542, 274 N.Y.S.2d 873, 875, concurred, stating that he was ruled by *Kulis*, despite his personal opinion and the large number of courts that had rejected the *Kulis* approach. 25 N.Y.2d at 178–79, 250 N.E.2d at 351–52, 303 N.Y.S.2d at 73–74.

statement conceded to be inadmissible in the prosecution's case in chief because of a *Miranda* violation could be used to impeach the defendant's credibility.[11] Chief Justice Burger, writing for the five-man majority, found that the impeachment was proper. He first distinguished *Miranda* on its facts as applying only to the use of statements in the prosecution's case in chief:

> Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling.... It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.[12]

Without further specifying what "legal standards" must be satisfied, beyond reference to the fact that the confession was not claimed by Harris to be coerced or involuntary,[13] the Chief Justice held that an exception to the exclusionary rule of *Miranda* must be made to counter perjurious testimony by the defendant. Weighing the "valuable aid to the jury in assessing petitioner's credibility" provided by the illegally obtained statement against "the speculative possibility" of police misconduct, he found that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." [14] Chief Justice Burger therefore widened the impeachment exception created by *Walder v. United States*[15] for illegally seized physical evidence to include illegally obtained confessions, affirming Harris' conviction.

Mr. Justice Brennan, writing for three of the four dissenting justices,[16] found this extension of *Walder* unwarranted. He noted that *Walder* dealt with matters entirely collateral to the instant case and that Justice Frankfurter sharply contrasted the situation in *Walder* with one where impeachment was sought on "the accused's direct testimony on matters directly related to the case against him." [17] Justice Brennan found the fifth amendment privilege against self-incrimination, as defined in *Miranda*, to be one of the constitutional safeguards which leaves the defendant " 'free to deny all the elements of the case against him,' " [18] without permitting the prosecution to introduce illegally secured evidence. He also felt that permitting the government to use an illegally obtained confession for impeachment would tend to prevent the defendant from speaking in his own behalf at trial, thereby "fettering" his choice to speak or remain silent.[19] Relying on *Miranda*, he rejected the idea that the statement was any less incriminatory because it was used for impeachment rather than introduced as substantive evidence.[20] Justice Brennan concluded that the majority had seriously undermined the self-incrimination privilege and the policies behind it specified in *Miranda*, especially the policy of "conforming police methods to the Constitution." [21]

Harris v. New York is one of the numerous cases

[11] 401 U.S. at 222.

[12] *Id.* at 224. The comments were made by Chief Justice Warren in discussing the need for a *per se* exclusionary rule:

> No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. *In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial* or to demonstrate untruths in the statement given under interrogation *and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.*

384 U.S. at 476–77 (emphasis added).

[13] 401 U.S. at 224.

[14] *Id.* at 225.

[15] 347 U.S. 62 (1954).

[16] Justices Douglas and Marshall joined Brennan's dissent. Justice Black dissented separately, without opinion.

[17] 401 U.S. at 227–28. *See* Agnello v. United States, 269 U.S. 20 (1925), the case distinguished by Frankfurter in *Walder*, 347 U.S. at 66.

[18] 401 U.S. at 229, quoting Walder v. United States, 347 U.S. at 65.

[19] 401 U.S. at 230. Justice Brennan here referred to Malloy v. Hogan, 378 U.S. 1 (1964), guaranteeing the right "to remain silent unless he [the accused] chooses to speak in the unfettered exercise of his own will." *Id.* at 8. He also cited Griffin v. California, 380 U.S. 609 (1965), which prohibits the prosecution from commenting on the fact that the accused did not take the stand.

[20] 401 U.S. at 231. *See* note 12 *supra*.

[21] 401 U.S. at 231–32. He found it "monstrous that courts should aid or abet the law-breaking police officer" in any way:

> The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense.

Id. at 232.

dealing with the problem of evidence obtained by the prosecution in violation of the law or constitutional guaranties. After defining the individual's right to be free from unreasonable search and seizure,[22] the Supreme Court developed the exclusionary rule of evidence to preserve that right. The Court held in *Weeks v. United States*[23] that illegally seized evidence could not be used at trial against the person from whom it was seized. The *Weeks* exclusionary rule generated impressive dicta, such as Justice Holmes' classic statement:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all.[24]

The rule was later extended to evidence obtained legally, but which was found through the illegally obtained evidence, under a theory that the illegal evidence "tainted" the subsequent legal evidence, so that it became inadmissible "fruit of the poisonous tree." [25] The exclusionary rule was made unequivocably applicable to the states in *Mapp v. Ohio*.[26]

The policy behind the exclusionary rule has most often been described as deterrence of official misconduct,[27] though the integrity of the judicial process and the reliability of the evidence are sometimes mentioned as alternative reasons for it.[28] Such justifications for the exclusionary rule have invited weighing the need for exclusion with countervailing policies and have produced exceptions. One such countervailing policy is the rebuttal of perjurious testimony, which the Supreme Court relied on in *Walder v. United States* to create an exception to *Weeks*. In *Walder*, the defendant had been indicted in 1950 for possession of narcotics. However, since the narcotics had been illegally seized, the evidence was suppressed and the indictment dropped.[29] In 1952, the defendant was indicted for new and different narcotics offenses. On direct examination, he denied ever dealing with narcotics and repeated this denial on cross-examination. The government was permitted to impeach him on the basis of the suppressed evidence seized in 1950.[30] To Justice Frankfurter, the issue was clear-cut:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.[31]

Justice Frankfurter sharply distinguished *Walder* from the situation in *Agnello v. United States*,[32] where illegally seized drugs were the subject of the charges, in order not to upset the *Weeks* protection. In *Agnello*, if the government could introduce the drugs during impeachment, to counter the defendant's denial of the charges against him, his right to testify in his own behalf without being forced to incriminate himself would be violated. In effect, the defendant would be "testifying" against himself, for as soon as he denied the charges, the government could produce the illegally obtained evidence to impeach his denial. It was not constitutionally permissible there to make any use of the illegally seized drugs, even for impeachment purposes, because they bore directly on the issue of guilt. Impeachment on collateral matters in *Walder*, on the other hand, was permissible because the issue of the defendant's guilt was not involved in his perjurious, volunteered "sweeping claim" never

[22] Boyd v. United States, 116 U.S. 616 (1886).

[23] 232 U.S. 383 (1914).

[24] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[25] Nardone v. United States, 308 U.S. 338, 341 (1940). *See* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579 (1968).

[26] 367 U.S. 643 (1961). The Court made a false start in Wolf v. Colorado, 338 U.S. 25 (1949), by making the fourth amendment prohibition of unreasonable search and seizure applicable to the states, as part of fourteenth amendment due process, without also applying the *Weeks* rule. This was done in the expectation that the states would automatically use the *Weeks* exclusionary rule without being told to do so by the Supreme Court. 367 U.S. at 650–55.

[27] *See* Bivens v. Six Unknown Agents, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting); Miranda v. Arizona, 384 U.S. at 445–57; Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L.C. & P.S. 246 (1961); McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 J. CRIM. L.C. & P.S. 266 (1961); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65 (1957); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255 (1961); Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U.L. REV. 46 (1957).

[28] *See, e.g.*, Comment, *The Collateral Use Doctrine: From Walder to Miranda*, 62 NW. U.L. REV. 912, 925 (1968); Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939, 946 (1967). *Cf.* Olmstead v. United States, 277 U.S. 438, 471 (1928) (dissenting opinion of Brandeis, J.).

[29] 347 U.S. at 62–63.

[30] *Id.* at 63–64.

[31] *Id.* at 65.

[32] 269 U.S. 20 (1925).

to have dealt with narcotics.[33] Though the evidence could not be used directly in the earlier case to establish guilt, it could be used collaterally in another case to impeach his credibility.[34] As far as deterring police misconduct, in the view of one lower court applying *Walder*, the government was penalized enough and the police were sufficiently curbed by preventing use of the evidence at the earlier trial.[35]

Walder dealt with tangible evidence, collected in a previous case, which was irrelevant to the criminal acts charged in the case at hand. The lower federal courts, primarily in the District of Columbia Circuit, extended the *Walder* collateral-use doctrine to confessions before *Miranda* was decided. In *Tate v. United States*,[36] Chief Justice Burger, then Circuit Judge, weighed the exclusion of a confession because of police misconduct against the need for truthful testimony.[37] Burger found that the defendant had admitted no criminal act in the statement, but that he had made a sweeping false claim about a collateral matter.[38] The collateral matter was not of an incriminating nature, so the confession was admissible. Judge Burger concluded by agreeing strongly with Justice Frankfurter that a defendant has no "freedom to 'resort to perjurious testimony.' " [39]

Walder was then extended to confessions of minor points concerning the criminal acts themselves. Though a statement bearing on the "central issue of the case" could not be used for any purpose,[40] a confession involving "minor points" could be used for impeachment.[41] Judge Bazelon was careful to emphasize that such an extension could not infringe the defendant's privilege against self-incrimination if the point were truly minor because "the truth of the impeaching statement does not itself tend to establish guilt." [42] Judge Lumbard reached a somewhat different result by requiring that the government first establish a prima facie case before it could impeach a defendant's alibi.[43]

After *Miranda*, however, no federal count would apply the *Walder* exception to a confession obtained without the *Miranda* warnings. The flat prohibitions in *Miranda*, which made the degree of incrimination an irrelevant consideration, were held to bar use of illegal confessions for impeachment as well.[44]

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[33] 347 U.S. at 65. *See* Inge v. United States, 356 F.2d 345, 349–50 (D.C. Cir. 1966); Johnson v. United States, 344 F.2d 163, 166 (D.C. Cir. 1964); Comment, *The Collateral Use Doctrine. From Walder to Miranda*, 62 NW. U.L. REV. 912, 919 (1968); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1030 (1966).

[34] The trial court, Frankfurter noted, had carefully instructed the jury that the evidence went solely to the defendant's credibility and had nothing to do with crimes currently charged. *Id.* at 64.

[35] United States v. Curry, 358 F.2d 904, 911 (2d Cir.), *cert. denied*, 385 U.S. 873 (1966), *reh. denied*, 387 U.S. 949 (1967).

[36] 283 F.2d 377 (D.C. Cir. 1960), noted 45 MINN. L. REV. 669 (1961).

[37] 283 F.2d at 379. Judge Burger based his opinion on the considerations he had expressed in his dissent to Lockley v. United States, 270 F.2d 915, 918 (D.C. Cir. 1959). The confession had been obtained during an illegal period of detention. *See* Mallory v. United States, 354 U.S. 449 (1957).

[38] 283 F.2d at 380–81. The defendant was charged with breaking into a hospital and theft. He admitted coming to the hospital with his accomplice in a car in the statement. At trial, he claimed he came alone and did not know the accomplice.

[39] *Id.* at 382, quoting Walder v. United States, 347 U.S. at 65.

[40] White v. United States, 349 F.2d 965, 968 (D.C. Cir. 1965), approving Bailey v. United States, 328 F.2d 542, 546 n. 3 (D.C. Cir.), *cert. denied*, 377 U.S. 972 (1964) (dissenting opinion of Wright, J.); United States v. Birrell, 269 F. Supp. 716, 727 (S.D.N.Y. 1967). *Cf.* Cannito v. Sigler, 321 F. Supp. 798, 803 (D. Neb. 1971).

[41] Inge v. United States, 356 F.2d 345, 349 (D.C. Cir. 1966), approving majority dicta in Bailey v. United States, 329 F.2d at 543–44. In *Bailey*, the decision was complicated by the fact that Judge Miller, for the majority, found there was no *Mallory* violation, so that his discussion of *Walder* was not necessary to the decision, while Judge Wright, dissenting, found that there was a *Mallory* viclation.

[42] 356 F.2d at 349. The statement involved in *Inge* was found by the court to relate too closely to the central issue, the defendant's guilt, so the court reversed. The statement could not be introduced to refresh the defendant's memory either, since it would have the same prejudicial effect on the jury. *Id.* at 350. *See also* White v. United States, 349 F.2d 965, 968 (D.C. Cir. 1965) (Statement "bore on the central issue of the case").

[43] United States v. Curry, 358 F.2d 904, 910–11 (2d Cir.), *cert. denied*, 385 U.S. 873 (1966), *reh. denied*, 387 U.S. 949 (1967).

[44] United States v. Fox, 403 F.2d 97, 102 (2d Cir. 1968); United States *ex rel.* Hill v. Pinto, 394 F.2d 470, 476 (3d Cir. 1968); Wheeler v. United States, 382 F.2d 998, 1001 (10th Cir. 1967) (dictum) (*Miranda* warnings found properly given); Rolland v. Michigan, 320 F. Supp. 1195 (E.D. Mich. 1970); Utsler v. Erickson, 315 F. Supp. 480, 483 (D.S.D. 1970) (harmless error); Hunt v. Cox, 312 F. Supp. 637, 642 (E.D. Va. 1970) (noting general trend); Flournoy v. Peyton, 297 F. Supp. 727 (W.D. Va. 1969) (assuming without deciding *Miranda* overrules *Walder*). In Brecdlove v. Beto, 404 F.2d 1019 (5th Cir. 1968), cited by Justice Brennan in *Harris* as refusing to apply *Walder*, 401 U.S. at 231 n. 4, the court found that the statement bore directly on the issue of guilt and had not been used simply to impeach. The Fifth Circuit found *Walder* to be of questionable validity in light of *Miranda*, though, in Agius v. United States, 413 F.2d 915 (5th Cir. 1969).

This rule was held not to apply to pre-*Miranda* confessions in Dillon v. United States, 391 F.2d 433, 437 (10th Cir.), *cert. denied*, 393 U.S. 825, 889 (1968); Fernandez v. Delgado, 257 F. Supp. 673 (D. Puerto Rico 1966).

In *Miranda* itself the Court noted, in dictum,[45] that it is often extremely difficult for the jury to separate direct and collateral evidence, so that what is strictly unconstitutional in the case in chief ought to be so for impeachment,[46] the prejudicial effect being almost the same. Most state courts followed the federal courts in holding that *Miranda* had clearly disapproved the application of the *Walder* exception to illegal confessions.[47]

The New York Court of Appeals held otherwise. In *People v. Kulis*,[48] a pre-*Miranda* case, the court laid down a rule that a statement obtained in violation of *Escobedo v. Illinois*,[49] though inadmissible in the prosecution's direct case, could be used to impeach the defendant's credibility. In its brief per curiam opinion, the majority relied on decisions by the District of Columbia Circuit and the Second Circuit, which had not yet acted to conform to *Miranda*,[50] to extend the *Walder* impeachment exception to illegally obtained confessions. Judge Keating, dissenting, found that the then-recent decision of *Miranda* made *Walder* of questionable validity,[51] but the majority ignored *Miranda* completely. The court approved extension of the *Kulis* rule to *Miranda* violations in another per curiam opinion, *People v. Harris*.[52] The *Kulis* rule was accepted by only a few state courts[53] before it was approved by the Supreme Court in *Harris v. New York*.

Interpreting *Walder* has always been a question of how far one ought to go in creating an exception to the *Weeks* exclusionary rule.[54] The lower court applications of *Walder*, prior to *Kulis*, carefully preserved Frankfurter's distinctions as they extended his exception to illegal confessions. As summarized by Judge Bazelon, *Walder* could be used for impeachment only with regard to sweeping claims by the defendant going beyond the crime charged, lawful acts collateral to the criminal acts with which the defendant was charged, or minor points concerning those criminal acts.[55] While it was not

[45] Blair v. United States, 401 F.2d 387, 392 (D.C. Cir. 1968); Groshart v. United States, 392 F.2d 172, 178 (9th Cir. 1968). *See* note 12 *supra*.

[46] 392 F.2d at 179. *See* United States v. Prebish, 290 F. Supp. 268, 273–75 (S.D. Fla. 168); State v. Brewton, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967), noted 42 N.Y.U.L. Rev. 772 (1967).

[47] *See* Velarde v. People, __Colo.__, 466 P.2d 919 (1970); State v. Galasso, 217 So.2d 326 (Fla. 1968); Franklin v. State, 6 Md. App. 572, 252 A.2d 487 (1969), *cert. denied sub nom.* Franklin v. Maryland, 399 U.S. 912 (1970); People v. Wilson, 20 Mich. App. 410, 174 N.W.2d 79 (1969); State v. Catrett, 276 N.C. 86, 171 S.E.2d 398 (1970); State v. Brewton, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967) (Pre-*Miranda*, but applied *Miranda* approach anyway); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968) (harmless beyond a reasonable doubt); Cardwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967) (harmless beyond a reasonable doubt). The following cases, cited for this proposition by Justice Brennan, 401 U.S. at 231 n. 4, were pre-*Miranda*, decided on the basis of Escobedo v. Illinois, 378 U.S. 478 (1964): People v. Berry, 237 Cal. App. 2d 154, 46 Cal. Rptr. 727 (1965); *cert. denied*, 386 U.S. 1024 (1967); People v. Luna, 37 Ill. 2d 299, 226 N.E.2d 586 (1967).

The general rule prior to *Escobedo* also prohibited the use of incompetent confessions for impeachment. *See* Annot., 89 A.L.R.2d 478 (1963). *See, e.g.*, Harrold v. Oklahoma, 169 F.47 (8th Cir. 1909); Kelly v. King, __Miss.__, 196 So.2d 525 (1967); State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960); Spann v. State, 448 S.W.2d 128 (Tex. Crim. 1969) (admissible in case in chief as res gestae).

[48] 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966), noted 13 N.Y.L.F. 146 (1967).

[49] 378 U.S. 478 (1964).

[50] *Compare* United States v. Fox, 403 F.2d 97 (2d Cir. 1968); Blair v. United States, 401 F.2d 837 (D.C. Cir. 1968) *with* United States v. Curry, 358 F.2d 904 (2d Cir. 1966); Bailey v. United States, 328 F.2d 542 (D.C. Cir. 1964); Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960); United States v. Birrell, 276 F. Supp. 798, 817 (S.D.N.Y. 1967).

[51] 18 N.Y.2d at 323–24, 221 N.E.2d at 542–43, 274 N.Y.S.2d at 876. *See also* United States *ex rel.* Kulis v. Mancusi, 272 F. Supp. 261, 264 (S.D.N.Y.), *aff'd* 383 F.2d 405 (2d Cir.), *cert. denied*, 389 U.S. 943 (1967).

[52] 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71, *aff'g* 31 App. Div. 2d 828, 298 N.Y.S.2d 245 (1969). *See* note 10 *supra*.

[53] *See* State v. Ross, 186 Neb. 297, 183 N.W.2d 225 (1971); State v. Kimbrough, 109 N.J. Super. 57, 262 A.2d 232 (1970); State v. Butler, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969). State v. Grant, 77 Wash. 2d 47, 459 P.2d 639 (1969), cited by Justice Brennan as following *Kulis*, 401 U.S. at 231 n. 4, dealt with an *Escobedo* violation, but made no mention of *Escobedo*, *Miranda*, or *Kulis*. *Grant* was apparently decided on general principles of evidence. *See* Annot., 89 A.L.R.2d 478 (1963) (minority rule).

[54] The fourth amendment reads, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . . but upon probable cause. . . .

See Boyd v. United States, 116 U.S. 616, 630–35 (1886), for a discussion of the relation between fourth amendment unreasonable search and seizure and fifth amendment self-incrimination. This case underlies all subsequent discussions by the Supreme Court of exclusion of evidence. *But see* concurring and dissenting opinion of Justice Black, Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971).

[55] Inge v. United States, 356 F.2d at 349. Some commentators have felt that Frankfurter never intended by the use of the term "elements of the case," 347 U.S. at 65, to permit the last two categories, introduced in Tate v. United States and Bailey v. United States. They argue that Justice Frankfurter, a careful man with words, would have used the familiar term "elements of the crime" if he had meant that. *See* Comment, *supra* note 28, at 919; 45 Minn. L. Rev. 669, 672–74 (1961).

entirely clear what else an illegally obtained statement could be used to impeach, one thing was quite certain: the statement could not be used if it were an admission of guilt. No matter how strong the policy against perjured testimony was, the defendant "must be free to deny all the elements of the case against him." [56] Obviously, such a denial might take the form of the defendant's giving his own version of the facts, so that to remain free to deny, he could not be contradicted by illegal evidence on matters relating directly to the issue of guilt.[57] In the words of Circuit Judge Warren Burger,

> The defendant *should* not be permitted to commit profitable perjury with impunity, but he *must* be permitted to deny the criminal act charged without thereby giving leave to the government to introduce by way of rebuttal evidence otherwise inadmissible. [Citation omitted] Plainly, he is not free to do this under threat of having an entire written confession of the crime received against him by way of rebuttal when he takes the stand and denies his guilt.[58]

The touchstone for application of the *Walder* impeachment exception was therefore the degree of prejudice against the defendant's self-incrimination privilege caused by admitting his illegally obtained statement into evidence for impeachment. While a trial court's instructions might or might not counter possible prejudice,[59] the fifth amendment privilege must be protected absent waiver.

Miranda spoke directly to the problems of waiver of the fifth amendment privilege and the degree of prejudice against it. For an effective waiver of the self-incrimination privilege, *Miranda* abandoned the voluntariness test announced in *Brown v. Mississippi*[60] and the totality of the circumstances test used in *Escobedo* in favor of requiring four straightforward warnings to the defendant: the defendant has a right to remain silent; anything he says can and will be used against him at trial; he has a right to have a lawyer with him; a lawyer will be appointed for him if he is indigent.[61] Only if all four prerequisites were satisfied would the privilege against self-incrimination be effectively waived so that the confession could be used by the prosecution.[62]

Regarding the degree of prejudice, the *Miranda* Court held that "[t]he privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." [63] Apparently, the Court had determined that the fifth amendment privilege was not a relative matter, subject to balancing with other considerations from time to time, but was an absolute protection which could not be circumvented absent a strong showing of intelligent waiver.[64] It was this language which persuaded most lower courts to deny application of the *Walder* exception where a *Miranda* violation was involved.

Miranda was by no means a unanimous decision, however. Justice Clark preferred the *Escobedo* totality of the circumstances test,[65] while Justices Harlan, Stewart, and White continued to support the voluntariness test.[66] The sharp division of opinion over confessions evidenced by the 5-4 *Miranda* decision invited exceptions to the *Miranda* exclusionary rule. To those familiar with the *Walder* exception to the *Weeks* exclusionary rule, the analogy to the *Miranda* exclusionary rule was obvious.[67] One commentator even suggested that the majority's approach actually made *Walder* properly applicable to confessions because the exclusion was no longer based on the unreliability of

[56] 347 U.S. at 65.

[57] Johnson v. United States, 344 F.2d at 166. *See* United States *ex rel.* Hill v. Pinto, 394 F.2d 470, 476 (3rd Cir. 1968) (post-*Miranda*); White v. United States, 349 F.2d 965, 968 (D.C. Cir. 1965); Tate v. United States, 283 F.2d at 380.

[58] Lockley v. United States, 270 F.2d 915, 921 (D.C. Cir. 1959) (dissenting opinion) (emphasis added). This became the majority view the next year in Tate v. United States, 283 F.2d at 379–80.

[59] *Compare* Breedlove v. Beto, 404 F.2d 1019, 1023 (5th Cir. 1968) (post-*Miranda*); Lockley v. United States, 270 F.2d at 920 (dissenting opinion) (Prejudice cannot be eliminated with admission of guilt) *with* Walder v. United States, 347 U.S. at 64 (collateral matters).

[60] 297 U.S. 278 (1936). *See* Comment, *The Coerced Confesssion Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313 (1963).

[61] 384 U.S. at 467–73.

[62] *Id.* at 444. The Court refused to make any distinction between "admissions" and "confessions," also. *Id.* at 476.

[63] *Id.* *See* note 12 *supra*.

[64] *See* 384 U.S. at 475.

[65] *Id.* at 502–03 (concurring and dissenting opinion).

[66] *Id.* at 524–26 (dissenting opinion of Harlan, J.), at 544–45 (dissenting opinion of White, J.). *See* Escobedo v. Illinois, 378 U.S. at 492–93 (dissenting opinion of Harlan, J.), at 493–95 (dissenting opinion of Stewart, J.), at 495–99 (dissenting opinion of White, J.).

[67] *See* George, *The Fruits of Miranda. Scope of the Exclusionary Rule*, 39 U. COLO. L. REV. 478, 491 (1967); Pitler, *supra* note 25, at 630–36; Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939, 950 (1967).

the evidence, but simply on official misconduct.[68] *Kulis* created just such an exception to *Miranda*, as affirmed in *People v. Harris*.

If *Miranda* were only intended to deter police misconduct, the collateral use exception might be acceptable as a matter of balancing conflicting policies. The deep dislike for perjury shown by Chief Justice Burger over the years[69] is certainly a valid factor for consideration. But *Miranda* was not simply a matter of prophylaxis—it also expressed a profound respect for the fifth amendment right against self-incrimination. An incriminating statement could be used only after the strictest safeguards had been observed, and the word "incriminating" was used in its broadest sense. The change in attitude shown in *Miranda* with respect to the right against self-incrimination should have mandated far greater weight on the side of the defendant than was given in the balancing done in *Harris v. New York*. The majority ignored the defendant's fifth amendment rights in its haste to assure that *Miranda* not be "perverted into a license to use perjury by way of defense." [70]

Aside from undermining the privilege against self-incrimination, there is a far more serious flaw in *Harris*. Harris' admission did not merely speak of matters collateral to the case, lawful acts collateral to the criminal acts, or minor points, but rather confessed the criminal acts themselves.[71] In short, the *Harris* majority let the prosecution present to the jury an illegally obtained admission of guilt on impeachment, the very thing Circuit Judge Burger so vehemently opposed in *Lockley v. United States* when he stated that no amount of instructions to the jury can eliminate such prejudice to the defendant.[72] This was also the vice condemned by the Supreme Court in *Agnello v. United States* when it held that the fifth amendment prohibits incrimination through illegally secured evidence.[73] Unless *Agnello* can somehow be distinguished by the fact that the defendant's perjurious answer was elicited on cross-examination while Harris' answer was made on direct,[74] *Harris* overrules *Agnello* sub silentio. If such a distinction can be made, however, the defendant now has no way of knowing just what he can say if he dares to testify in his own defense. He can deny the charges but, according to *Harris*, he cannot commit perjury. Yet if the defendant denies the charges but is actually guilty of them, he *has* committed perjury. The majority does not suggest an answer to this conundrum. A far better approach would have been to allow the defendant to perjure himself on the stand by not letting in the illegally obtained statement, as was done in the District of Columbia Circuit, wherever the testimony relates to the issue of guilt.[75] In *Harris*, the defendant's statement on the stand could well have been impeached by bringing in a chemical analysis of the contents of the bags which he admitted on the stand that he had sold. *Miranda* prescribes far more respect for fifth amendment rights than was shown by the *Harris* majority in completely disregarding the highly incriminatory nature of Harris' "impeachment."

The key to understanding *Harris v. New York* is probably not an examination of the *Walder* exception, which does not justify the majority's conclusion, but an examination of *Miranda*, where Chief Justice Warren and Justices Black, Douglas, Brennan and Fortas were the majority. The minority in *Miranda* was Justice Clark, who adhered to *Escobedo*, and Justices Harlan, Stewart, and White, who adhered to the pre-*Escobedo* voluntariness test.[76] The *Harris* majority consisted of Chief Justice Burger and Justices Harlan, Stewart, White and Blackmun. In the minority were Justices Black, Douglas, Brennan and Marshall. Chief Justice Burger did not say what "legal standards" must be met before a confession violating *Miranda* may be used for impeachment,[77] but he did note that "[p]etitioner makes no claim that the statements made to the police were coerced or involuntary." [78] *Harris* looks suspiciously like a return to the voluntariness test wherever *Miranda* can be distinguished and demonstrates a favorable climate for

[68] George, *supra* note 67, at 491. Professor George felt that *Walder* should not be applied to confessions which failed the voluntariness test, because they were bound to be unreliable and so should be absolutely excluded from the eyes of the jury. A *non-coerced* confession, though obtained in violation of *Miranda*, would be fairly reliable and could admitted under some circumstances for some purposes. *Cf.* Kent, *Miranda v. Arizona—The Use of Inadmissible Evidence for Impeachment Purposes*, 18 W. RES. L. REV. 1177, 1179–81 (1967); Comment, *supra* note 33, at 928–29.

[69] *See* text accompanying notes 2–3 *supra*.

[70] 401 U.S. at 226.

[71] *See id.* at 225–26; Tate v. United States, 283 F.2d at 381.

[72] 270 F.2d at 920.

[73] 269 U.S. at 33–34. *See* text accompanying note 32 *supra*.

[74] *See* 401 U.S. at 223; 269 U.S. at 29–30. *Cf.* Comment, *supra* note 33, at 914.

[75] Bailey v. United States, 328 F.2d at 546 n. 3 (Wright, J., dissenting), approved in White v. United States, 349 F.2d at 968. *See* note 41 *supra*.

[76] *See* text accompanying notes 65–66 *supra*.

[77] 401 U.S. at 224.

[78] *Id.*